

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF)	
Costello Investments LLC)	
320 North Main Ave., Suite C)	DOCKET NO. CWA-08-2004-0037
Sioux Falls, SD 57104)	
)	
Respondent.)	

ADMINISTRATIVE COMPLIANCE ORDER ON CONSENT

I. INTRODUCTION

This Administrative Order on Consent (“Consent Order”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and Costello Investments LLC (“Costello”). This Consent Order concerns mitigation for environmental damages caused by unauthorized discharges of dredged or fill material at Costello’s Green Meadow Addition, located near Harrisburg, South Dakota, approximately 4.5 miles south of Sioux Falls on Lincoln County Highway 110.

II. STATUTORY AUTHORITY

_____The following Findings and Order are made and issued pursuant to the authority vested in the EPA Administrator by Sections 308 and 309 of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1318 and 1319, which has been delegated by the EPA Administrator to the Regional Administrator of EPA Region 8 and redelegated by the Regional Administrator of Region 8 to the Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, EPA Region 8.

III. PARTIES BOUND

This Consent Order shall apply to and be binding upon EPA. It shall also be binding upon Respondent Costello and its agents, successors, and assigns. The signatories to this Consent Order certify that they are authorized to execute and legally bind the parties they represent to this Consent Order. No change in the ownership or corporate status of the Respondent shall alter the Respondent's responsibilities under this Consent Order.

IV. STATEMENT OF PARTIES

The Respondent consents to the issuance of this Consent Order and agrees to abide by all of the terms and conditions herein. Respondent also agrees not to challenge the jurisdiction of EPA or the following Findings of Fact and of Violation in any proceeding to enforce this Consent Order.

V. FINDINGS OF FACT AND OF VIOLATION

1. Costello Investments L.L.C. ("Costello," or the "Respondent") is a limited liability corporation organized under South Dakota law. It is engaged in real estate development. It sometimes has done business under the name Costello Realty Company.
2. At all times relevant to this proceeding, Costello has owned and controlled property, including Lots 1 and 2 of the Northeast Quarter, except Lot H-1, of Section 2, Township 99 North, Range 50 West of the 5th P.M., in Lincoln County, South Dakota (the "Site"). A residential subdivision known as the Green Meadows Addition is being built at the Site.
3. Prior to development, the Site included two wetland areas: Wetland A, consisting of 0.75 acres and extending 4,097 feet from north to south in the eastern portion of the Site, and Wetland B, consisting of 1.57 acres and extending 1,942 feet from northwest to southeast in the southern portion of the Site.
4. On May 22, 2002, James Oehlerking, Project Manager for the South Dakota Regulatory Office of the United States Corps of Engineers ("Corps"), completed a preliminary Jurisdictional Determination for the Site, indicating that the Site included "waters of the United States" subject to Clean Water Act jurisdiction. The bases for jurisdiction were the presence of tributaries to waters of the United States and wetlands adjacent to waters of the United States.
5. Wetland A is part of an unnamed tributary of Nine Mile Creek, which flows into the Big Sioux River, and then to the Missouri River, a navigable-in-fact waterway. Wetland B is part of an unnamed tributary flowing into the Wetland A tributary.
6. On June 7, 2002, Steven E. Naylor, Regulatory Program Manager for the South Dakota Regulatory Office of the Corps, confirmed, in a letter addressed to Respondent's engineer and surveyor, Schmitz, Kalda & Associates, Inc., that Wetlands A and B were subject to Clean Water Act jurisdiction. The letter stated that developing the Site "may involve the discharge of dredged or fill material" and requested an application for a Department of the Army permit under Section 404 of the CWA. The letter enclosed a permit application form and offered assistance in completing the application.
7. During June and July, and possibly May, of 2002, Respondent's agent discharged dredged or fill material into 0.88 acres in Wetlands A and B.
8. On July 31, 2002, Mr. Oehlerking inspected the Site and found that approximately 1,500 feet of two existing natural drainages at the Site had been filled. On August 1, 2002, the Corps notified Respondent in writing of this finding and directed the Respondent to "cease and desist any further unauthorized work."
9. CWA Section 301, 33 U.S.C. § 1311, prohibits any person from discharging a pollutant

from a point source into waters of the United States without authorization by certain enumerated sections of the Clean Water Act, including CWA Section 404, 33 U.S.C. § 1344.

10. Respondent is not and never has been authorized by a permit issued under CWA Section 404, 33 U.S.C. § 1344, to discharge dredged or fill material into Wetland A or Wetland B.

11. Respondent has not been authorized by a permit issued under CWA Section 404, 33 U.S.C. § 1344, to allow the discharged dredged or fill material to remain in Wetland A or Wetland B.

12. The dredged or fill material discharged into Wetlands A and B constitute "pollutants" as that term is defined in CWA Section 502(6), 33 U.S.C. § 1362(6).

13. The discharges of dredged or fill material into Wetlands A and B were from various pieces of equipment, including but not limited to a track backhoe, a bulldozer, a pan, a road grader, and dump trucks, each of which is a "point source" as that term is defined in CWA Section 502(14), 33 U.S.C. § 1362(14).

14. Respondent is a "person" as that term is defined in CWA Section 502(5), 33 U.S.C. § 1362(5).

15. Wetlands A and B are "waters of the United States" as that term is defined in 33 C.F.R. § 328.3(a) and are therefore "navigable waters" as that term is defined in CWA Section 502(7), 33 U.S.C. § 1362(7).

16. The adverse impacts of the Respondent's discharges to Wetlands A and B are presumed to be avoidable in the terms of the "Practicable Alternatives" analysis set forth in the Section 404(b)(1) Guidelines, 40 C.F.R. Part 230.

17. Wetlands A and B and their surrounding areas have provided various functions and values, including: wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood attenuation; and aesthetics.

18. After discharging dredged or fill material into Wetlands A and B, Respondent applied to the U.S. Army Corps of Engineers for a permit issued under CWA Section 404, 33 U.S.C. § 1344, for "after-the-fact" authorization for these discharges. The permit application has not been granted.

19. Respondent's discharges of dredged or fill material into Wetlands A and B without a CWA permit constitute violations of CWA Section 301, 33 U.S.C. § 1311.

20. The impact of the Respondent's violations will continue each day that the fill remains in the affected wetlands.

21. Activities to be carried out under this Consent Order are remedial, not punitive, and achievable as a practicable matter through commonly used construction, digging, filling, revegetation, and best management practices. The actions required by this Consent Order are necessary to achieve the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA Section 101(a), 33 U.S.C. 1251(a).

22. The preceding Findings of Fact and of Violation and the following Order for Compliance have been made after consultation and coordination with the United States Army Corps of Engineers, Omaha District.

VI. ORDER FOR COMPLIANCE

Based upon the foregoing Findings of Fact and of Violation, it is hereby ORDERED:

1. Respondent is enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its regulations.

2. No later than June 30, 2004, Respondent shall begin to implement the "Wetland Mitigation Plan for Green Meadows Addition, Harrisburg, South Dakota," attached as Exhibits A and B to this Order and hereby incorporated by reference (the "Mitigation Plan"). The Mitigation Plan consists of four pages (Exhibit A) and nine additional sheets with maps and diagrams (Exhibit B).

3. This Consent Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States, regardless of whether such activity is related to the Mitigation Plan. It shall be Respondent's responsibility to consult with the U.S. Army Corps of Engineers, Omaha District, to determine if any activity, whether required by the Mitigation Plan or not, will require authorization from the Corps of Engineers under Section 404 of the Clean Water Act and, if any such authorization is necessary, to obtain it before undertaking that activity.

4. Any deliverables, plans, reports, specifications, schedules and attachments required by this Consent Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Consent Order and subject to EPA enforcement action.

5. If an event causes or may cause delay in the achievement of any requirement of this Consent Order, Respondent shall notify EPA orally as soon as possible and in writing within ten (10) working days from the date Respondent first knew of such event or should have known of such event by exercise of due diligence, whichever is earlier. Respondent's written notice shall specify the length of the anticipated delay, the cause(s) of the delay, the measures taken or to be

taken by Respondent to minimize the delay, and a timetable by which those measures will be or have been implemented. Notification to EPA pursuant to this paragraph of any anticipated delay, by itself, shall not excuse the delay or the obligation of Respondent to comply with requirements and deadlines of this Consent Order, unless EPA grants a written extension of the applicable requirement or deadline.

6. If Respondent demonstrates to EPA's satisfaction that the delay or anticipated delay has been or will be entirely caused by circumstances beyond the control of Respondent or any of Respondent's agents, that Respondent could not have foreseen and prevented such delay despite due diligence, and that Respondent has taken all reasonable measures to prevent or minimize such delay, EPA may excuse performance or extend the time for performance of such requirement for a period not to exceed the actual delay resulting from such circumstances. EPA's determination on these matters shall be made as soon as possible, and in writing within ten (10) working days, after the receipt of Respondent's written notification of the event. The parties agree that neither changed economic circumstances nor increased costs for performing the terms and conditions of this Consent Order or for implementing the Mitigation Plan ordered herein shall be considered circumstances beyond the control of Respondent.

7. Respondent shall allow or arrange to use its best efforts to allow access by any authorized representatives of EPA, the Corps, the United States Department of Justice, the United States Fish and Wildlife Service, or the South Dakota Department of Game, Fish & Parks, with prior notice and upon proper presentation of credentials, to the Site and to non-privileged records relevant to this Consent Order to inspect and monitor progress of the activities required by this Consent Order, including but not limited to the Mitigation Plan, or to verify data submitted to EPA. This Consent Order shall in no way limit or otherwise affect the United States' authority to enter, conduct inspections, have access to non-privileged records, or monitor compliance pursuant to any statute, regulation, permit, or court order.

8. This Consent Order shall be effective upon execution by the parties. If Respondent has questions or concerns about the implementation of this Consent Order, EPA requests that Respondent meet with EPA to discuss them.

9. Respondent shall submit all notifications and correspondence to:

Diane Sipe, 8ENF-W
Director, Water Technical Enforcement Program
U.S. Environmental Protection Agency
Region 8
999 18th Street, Suite 500
Denver, Colorado 80204-2405

10. EPA agrees to submit all notifications and correspondence to:

Daniel Costello, Managing Member
Costello Investments L.L.C.
320 North Main Avenue, Suite C
Sioux Falls, SD 57104

Please be advised that 33 U.S.C. § 1319(d) authorizes civil penalties of up to \$27,500 per day for each violation of Clean Water Act Section 301, 33 U.S.C. § 1311, and 33 U.S.C. § 1319(c) authorizes fines and imprisonment for willful or negligent violations of the Clean Water Act. Issuance of this Consent Order shall not be deemed an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Clean Water Act for the violations giving rise to this Consent Order. FURTHER, the Criminal Fine Enforcement Act of 1984, P.L. 98-596, provides for fines in excess of the amount specified in the statute under certain circumstances. Compliance with the terms and conditions of this Consent Order shall not be construed to relieve Respondent of its obligations to comply with any applicable federal, state, or local law.

BY: **SIGNED**
Daniel Costello, Managing Member
Costello Investments L.L.C.

DATE: **4-14-04**

BY: **SIGNED**
Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance, and
Environmental Justice
U.S. Environmental Protection Agency, Region 8

DATE: **5/6/04**

Exhibit A
Administrative Order on Consent
In the Matter of Costello Investments LLC,
United States Environmental Protection Agency Docket No. CWA-08-2004-0037

**Wetland Mitigation Plan
For Green Meadows Addition, Harrisburg, South Dakota**

SUMMARY

1.0

This mitigation plan (“Plan”) has been prepared to address aquatic impacts that have occurred within the Green Meadows Addition (“Site”).

Costello Investments LLC (“Costello”) will mitigate for impacts to 0.88 acres of wetlands at the Site by restoring and/or constructing 1.24 acres of wetlands at the Site. The mitigation wetlands that will result from this mitigation plan are expected to be significantly more diverse than the pre-existing wetlands in terms of hydrologic regime and vegetation and will provide a higher level of wetland functions than the wetlands that existed before the impacts. After mitigation, the wetlands are expected to have a permanent hydrologic regime and a multi-layered wetland vegetation community, with increased functions for flood flow attenuation, water quality enhancement, and wildlife.

2.0 PROJECT DESCRIPTION

The Site is a housing development of approximately 322 single-family homes. It is now under construction. It is near Harrisburg, South Dakota, approximately 4.5 miles south of Sioux Falls, on the southwest corner of the intersection of Lincoln County Highways 110 and 123. It consists of approximately 160 acres and occupies the NW ¼ of Section 2, T99N, R50W of the 5th Principal Meridian in Lincoln County. The Site’s location is shown in Sheet 1, also known as Title Sheet, of the nine pages of drawings by Schmitz, Kalda & Associates that constitute Exhibit B to the Administrative Order on Consent in this action.

3.0 IMPACTS FROM PROJECT

3.1 Wetland impacts

The Site contains areas that the U.S. Army Corps of Engineers (“Corps” or “USACE”) has found to be wetlands subject to the Clean Water Act, based on a jurisdictional determination conducted by the Corps for the Site on May 14, 2002 and confirmed in a June 7, 2002 letter from the Corps to Schmitz, Kalda & Assoc., Inc., engineers and surveyors for Costello. Two wetland areas have been impacted: Wetland A and Wetland B, which are described in Sheet 2 of Exhibit B.

3.2 Impacts

Upon Costello's request, Farmers National Company visited the Site and responded in writing on November 27, 2002, identifying most of the vegetation types that existed within Wetlands A and B. The identified plant species were recorded as: Curly Dock (a facultative wetland species, or FACW), Cattail (an obligate species, or OBL), Kochia (an upland species, or UPL), Oxeye Daisy (UPL), Wild Sunflower (a facultative upland species, or FACU), Swamp Smartweed (OBL), and some cool season grasses. By reviewing photographs taken of the site, EPA has reason to believe that Broadleaf Cottonwood (facultative or FAC) and Chinese Elm (UPL) probably existed in Wetlands A and B.

Although all of the existing wetlands within the boundaries of 160-acre Site may be affected by the construction of the proposed subdivision, for the purpose of resolving this violation, wetland impacts have been calculated to total 0.88 acres.

4.0 MITIGATION PLAN

4.1 Goals

The goal of the mitigation plan is to provide 2.68 wetlands at the Site and to increase the wetland functions in the Big Sioux River watershed (Wetlands A and B being tributaries to the Big Sioux River, via Nine Mile Creek). Mitigation will be accomplished by restoring 0.88 acres of wetlands at the Site and creating an additional 0.36 acres on the Site with an equal or higher functional value compared to the impacted areas. Wetlands A and B contained 0.75 and 1.57 acres, respectively, i.e., a total of 2.32 acres, before construction began. Restoring the 0.88 acres that were lost and creating an additional 0.36 acres, to account for temporal loss, will result in 2.68 acres of wetlands on-site.

4.2 Onsite Mitigation

4.2.1 Types of Habitats and Functions to be Created

The mitigation is expected to improve the functions of the wetlands at the Site by providing additional and diverse wildlife habitat for birds, waterfowl, small animals, amphibians and rodents. Flood retention is expected to improve, because the configuration of new road crossings, proposed jetties, and grade control structures will enable the new wetlands complex to handle 100-year floods. Ground water recharge may improve, depending on the design configuration, including the slope of the channel. The hydrophytic vegetation that will be planted as part of the mitigation is expected to improve water quality.

4.2.2 Success Criteria

The mitigation will be considered successful when EPA confirms in writing that the wetlands at the Site have achieved at least 80% ground cover of "FAC," "FACW," and "OBL" wetland plant

species, and that 80% of tree species planted along Wetland A are living at the time the forbs and grasses have reached their 80% ground cover requirement.

4.2.3 Description of On-Site Mitigation Construction

The mitigation wetlands will be constructed by building a drainageway as described in the drawings on Sheet Nos. 3-9 of Exhibit B. Costello will plant prairie cordgrass, whitegrass, and redtop in the wetlands and, to help prevent or minimize erosion, intermediate wheatgrass (at a density of 9.90 pounds per acre) and smooth brome grass (at a density of 8.07 pounds per acre) in adjacent uplands. Costello will plant 40 Bur Oak trees, 5 Golden Willow trees, and 11 Black Chokecherry trees, all of which are to be potted stock, along both sides of Wetland A. Costello will exercise all due care in planting and maintaining the vegetation, including but not limited to following the seed suppliers' recommendations in planting the seeds and trees. If any tree dies before EPA confirms in writing that the success criteria have been met, Costello will during the same planting period replace that tree with another tree of the same species. Costello may substitute a species of any tree or other plant upon demonstrating to EPA that another species would promise more success in mitigation and obtaining EPA's written approval.

RESPONSIBILITY AND SCHEDULE

5.0

The party responsible for completion of the mitigation is:

Daniel Costello
Costello Investments, LLC
320 N. Main Ave.
Sioux Falls, SD 57104
(605) 336-9131

Costello shall begin mitigation during the spring of 2004. Costello will be responsible for obtaining all regulatory approvals necessary to proceed with mitigation, including but not limited to any permit required under Section 404 of the Clean Water Act, prior to initiating any activity that needs such approval or permit.

6.0 MONITORING AND MAINTENANCE

Costello shall submit annual written monitoring reports to EPA Region 8 until EPA acknowledges in writing that the mitigation is successful and that no further written monitoring reports are required.

Costello's annual monitoring reports will assess progress toward meeting the success criteria mentioned above and will note any deficiencies or problems in meeting the success criteria. The reports will describe all existing conditions and measures recommended to increase the success of the mitigation. If, by the end of the second growing season, the success criteria have not been met, Costello will propose measures to remedy the situation and take corrective measures as

directed by EPA.

Costello will maintain the wetlands as needed at all times before EPA notifies Costello that the success criteria have been met. Maintenance will include, as appropriate, repairing all waterways, outlet structure, replanting, as necessary, the wetlands, planted trees, shrubs, and forbs on the Site.

The mitigated wetlands are expected to be permanent features of the landscape, because they are in a natural tributary to Ninemile Creek. Due to an adequate water supply, good soils, and the presence of wetland vegetation in the area, it is anticipated that the wetland mitigation will not require significant maintenance.

Costello shall record in the real property records of Lincoln County, South Dakota, a permanent conservation easement obligating the current and each successive owner of the wetlands to be mitigated under this plan to protect the wetlands from any future use and impacts that may be inconsistent with the mitigation. This easement shall be a binding covenant running with the land. Costello will provide EPA Region 8 with a copy of the conservation easement no later than March 31, 2005.

FOR COPIES OF EXHIBIT B, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON MAY 12, 2004.